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Champlin Shores Assisted Living and SEIU Healthcare Minnesota. Cases 18–RC–087228 and 18–CA–093766

October 31, 2014

DECISION, CERTIFICATION OF
REPRESENTATIVE, AND NOTICE TO
SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On February 14, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 63. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the certification of SEIU Healthcare Minnesota (the Union) as bargaining representative in the underlying representation proceeding. The Board's February 14, 2013 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceeding. The prior proceeding, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give it preclusive effect. Accordingly, we consider below the representation issues that the Respondent has raised in this proceeding.

In Case 18–RC–087228, the Union petitioned to represent a unit including resident assistants and medication technicians but excluding all other employees. The Respondent argued that the unit must also include all wait staff, kitchen helpers, and the life enrichment assistant. Applying *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. *Kindred Nursing Center East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Regional Director found that the petitioned-for unit was appropriate. The Respondent filed a request for review arguing that *Specialty Healthcare* was wrongly decided and that, in any event, the petitioned-for unit was not appropriate.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the representation issues raised by the Respondent, and we find them without merit. Accordingly, we deny the Request for Review in Case 18–RC–087228 as it raises no substantial issues warranting review.¹

We next consider the question whether the Board can rely on the results of the election. For the reasons stated below, we find that the election was properly held and the tally of ballots is a reliable expression of the employees' free choice.

As an initial matter, had the Board decided not to issue decisions during the time that the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, the Regional Director would have conducted the election as scheduled and counted the ballots. In this regard, Section 102.67(b) of the Board's Rules and Regulations states, in relevant part:

The Regional Director shall schedule and conduct any election directed by the [Regional Director's] decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted[,] ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (Emphasis in original.)

¹ In denying review, we observe that no party requested review of the Regional Director's finding that the wellness coordinator is a supervisor within the meaning of Sec. 2(11) of the Act.

See also Casehandling Manual, Part 2, Representation Proceedings, Sections 11274, 11302.1(a) (same).

However, this vote and impound process does not apply when the Board lacks a quorum. In this regard, Section 102.182 of the Board's Rules and Regulations states:

Representation cases should be processed to certification.—During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Thus, it is clear that the decision of the Board to continue to issue decisions did not affect the outcome of the election. With or without a decision on the original Request for Review, the election would have been conducted as scheduled. This result is required by Section 102.67(b) of the Board's Rules, and, under *Noel Caning*, the sitting Board Members did not have the authority to issue an order directing otherwise. Thus, the timing of the election was not affected by the issuance of a decision on the Request for Review, and we find that the determination by the Regional Director to open and count the ballots was appropriate and in accordance with Section 102.182. In any event, the actions of the Regional Director did not affect the tally of ballots. Accordingly, we will rely on the results of the election and issue an appropriate certification.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for SEIU Healthcare Minnesota, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time, and casual/on call resident assistants and medication technicians employed by the Employer at its Champlin, Minnesota facility*; excluding all other employees, office clerical employees,

managerial employees, and guards and supervisors as defined in the Act. *The parties stipulated at the hearing that regular part-time and casual/on call employees are limited by the standard established in *Davison-Paxon Co.*, 185 NLRB 2 (1970).

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeal. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before November 10, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before November 24, 2014.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before December 15, 2014 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. October 31, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD